United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL

75-1293

United States Court of Appeals

For the Second Circuit.

B
P/S

UNITED STATES OF AMERICA,

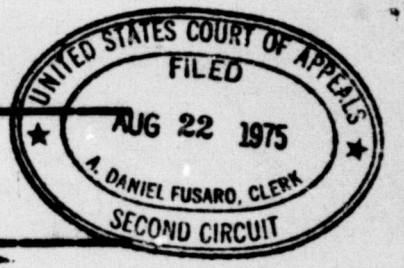
Plaintiff-Appellee,

v.

JOHN LYNCH and KENNETH MC NALLY,

Defendants-Appellants

On Appeal From The United States District Court For The Southern District Of New York



Appellants' Brief

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

- against -

JOHN LYNCH and KENNETH MC NALLY,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

PRELIMINARY STATEMENT

The appellants appeal from judgments of the United States District Court, Southern District of New York, (Judge Lloyd F. MacMahon), whereby they were convicted under the first count of the indictment charging a theft of a motor truck moving in commerce, in violation of 18 U.S.C. 659 and 2. Additionally, the appellant Lynch was convicted under the second and fourth counts of the said indictment charging a violation of 18 U.S.C. 921(a)(2)(3) and 924(c), charging possession of a firearm during the commission of a felony, namely the theft of a motor truck moving in interstate commerce, and the third count of the said indictment charging 18 U.S.C. 659 and 2.

The appellant McNally was originally joined in the third count of the indictment charging a theft of a motor truck, but was acquitted by the jury. As a consequence the appellant McNally was sentenced to a six (6) year jail term; Lynch was sentenced to an eight (8) year jail term under each count, service of the sentences to be served concurrently.

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW:

A. Were the appellants denied adequate representation by counsel because of a conflict and should the Court below have held an evidentiary hearing to determine the issue of conflict in representation, and if so, was the hearing held by the Court below adequate?

B. Was McNally's right to summon witnesses for his defense observed?

C. Was the Court's charge as to evidence of identification sufficient?

STATEMENT OF THE CASE AGAINST THE APPELLANTS:

For proof as to counts one and two, the government called a witness named Gary Andrews who testified that on June 26, 1974 at about 6:00 P.M. he drove a truck to the Midtown Packing Co. at 12th Avenue and 125th Street in Manhattan, accompanied by Albert Fillmore (1)*. The truck was carrying meat to be delivered in Connecticut, Massachusetts and Rhode Island (25). They proceeded to another pick-up. At 11:00 P.M. the truck stopped for a traffic light. There was a tap on the passenger side of the window and Andrews observed a man with a gun outside (the intruder was identified as Lynch). That person told him to open the door, Fillmore complied. The man identified as Lynch entered the truck. He was unmasked (4).

At a line-up held November 12, 1974 this witness selected Lynch who participated in the line-up (4, 5, 6, Government's Exhibit 1). The intruder told the witness to follow a yellow Cadillac (7). He did so and was ultimately told to stop and release the brakes. The intruder and Fillmore left the truck, the intruder telling the witness to follow them, threatening him if he disobeyed (8). The witness joined the intruder and Fillmore at a corner. The assailant directed him to follow the yellow Cadillac and told him and Fillmore to sit in the

*( )This refers to the pagination of the appendix furnished by the appellants above.

rear and put their faces close to the floor (8).

Andrews identified the driver of the car as McNally (10). He also selected McNally who was in a line-up conducted October 30, 1974 (10, 11, Government's Exhibit 2).

At any rate, they drive around for one to one and a half hours when the person identified as Lynch left the car and shortly returned with beer which he offered to the witness and Fillmore (11, 12). Ultimately the car was stopped for the witness to go to the bathroom. Returning, the drivers continued when a person identified as Lynch made a call and told the witness that since the truck couldn't move, the witness should instruct the person at the other end of the telephone how to move the vehicle (13). Continuing the automobile drive, they all stopped at a bar (13, 14). In the bar Lynch, the witness and Fillmore were seated in a booth; the person identified as McNally was seated at the bar about twelve (12) feet away (14, 15). Two hours later they all left, drove, and then this witness gave the person he described as Lynch the keys to the truck (16). During the course of time the witness fell asleep. When he awoke the person he described as Lynch was not present; another man and the person he described as McNally were present. The witness saw the side and front view of the face of the person he claimed was McNally (12). In the late afternoon of that day the witness and his companion, Fillmore, were released (18). The empty truck was ultimately found in Yonkers (19).

On cross examination the witness related that at the initial encounter the person he claimed was Lynch was about four feet away; it was also dark (20, 21). Within two hours of release the witness reported the incident to the police (24). The police showed him pictures. On August 5, 1971 he was at the office of the federal authorities (25-28). He was also shown pictures there, but could not identify Lynch (29). He did remember seeing a picture of Lynch (Exhibit 2, 29). Four to five months later this witness went to view a line-up (29, 30). The witness also was asked on cross examination whether he selected a picture of Lynch at the precinct. The witness replied that he didn't select a photo of Lynch but one of McNally (33, 34).

Robert Fillmore testified that he was a partner of Andrews, the previous witness. He recounted the events that Andrews related to the jury (91, 94, 96, 99). He identified Lynch as the one who stopped the truck (92). He also claimed that McNally drove the Cadillac that he and Andrews ultimately entered (92, 95).

On August 5, 1974 this witness viewed photographs at the office of the federal authorities. He picked out a photo of a person named Santoro (Government's Exhibit 11, 98, 99). On August 19, 1974 between 8:00 and 9:00 P.M. he and Andrews

were driving to Connecticut. At a toll station on the highway, the vehicle he was operating stopped. He left the truck and saw a person he described as Lynch who ran after him. Fillmore ran to the middle of the road (99, 100). There he called the FBI (101). He went to the FBI's office and again viewed pictures (101, 102). The witness recounted that he viewed two line-ups respectively on October 30, 1974 and December 12, 1974 and he identified from each respective line-up the appellants (102-105, Government's Exhibits 13 and 14).

In regard to the proof as to counts three and four, Luther Thomas testified that he was employed by the Naps Transportaticn as a truck driver (35, 36). On September 6, 1974 he was loading meat into a truck in Manhattan to be driven to New Jersey (36, 37). He was accompanied by a person called Jermott. The truck stopped for a traffic light and a man with a gun entered the truck (38). He described the intruder as 40 years of age, between 5'8" or 5'9" in height, having black-gray hair (40). He identified this person as Lynch (41). On November 12, 1974 at the office of the FBI he selected Lynch from a line-up (41-42, Government's Exhibit 5).

Continuing his testimony as to the events, the witness stated that the person he described as Lynch directed him to park his truck at 37th Street and 10th Avenue in Manhattan.

After a lengthy wait, the person he described as Lynch directed him to go to the New Jersey Turnpike and stop at the second service area (44).

There Lynch attempted to make a telephone call but was unsuccessful (45). The person he described as Lynch then directed him to drive to the first service area on the Turnpike. Arriving there the person he described as Lynch made a telephone call. All left (46, 47). The witness claimed he had the person he described as Lynch under observation for thirty minutes.

At this location a red Chevrolet appeared (48). A second man emerged from the red Chevrolet and joined Lynch. The witness never saw that man before or after the incident (48). After the witness showed "him" the brake release of the truck, all four entered the red Chevrolet (48, 49). The witness did not see the driver of the red Chevrolet in the Courtroom (50, 51). Nor could he be certain that McNally drove the red car (50). Shown Government's Exhibit 4, a picture of McNally, the witness said it looked like McNally (51, 52).

On November 12, 1974 this witness went to a line-up however he did not select any member of the line-up (53). This witness described the incidents, including the stopping of the truck, and the drinking of beer and whiskey which was given to him by the intruder (54, 55). Ultimately the truck stopped

at a Howard Johnson motel and the person he described as Lynch left (55).

On cross examination this witness related that the truck was stopped in lower Manhattan, near a meat market called "Old Bohemia", a place that he made deliveries to (57, 58). Initially he didn't take a "good look" at the intruder but later he did (58). The witness could not identify the second person who joined them (60). At a second line-up he attended, he selected a suspect (65).

Edward Jermott testified that he was employed by Thomas, the previous witness (66). He described the initial confrontation and the intrusion (67, 68). He identified Lynch (69).

At a line-up conducted November 12, 1974 this witness did not select Lynch from the line-up (69). Then during the trial he was shown a picture of that line-up, Government's Exhibit 1, and at trial and before the jury he selected Lynch (70). He wasn't certain of the identity of the man who drove the red car (72). Shown Government's Exhibit 3, a photograph, this witness stated that that picture looked like the man who drove the red car (73, 74).

The witness was confronted with his prior testimony had before the grand jury. His testimony there was that Lynch was the person who entered the truck. He then stated that Lynch was the person who drove the red car (88, 89). On redirect examination he recognized a member of the first line-up, but never disclosed that to the authorities (90).

THE DEFENSE:

The appellant McNally testified that he was forty-three (43) years old, and he gave his background including his years of military service in the Korean War (106, 107). In 1971 he was convicted of driving without having his license with him when he was stopped. As a consequence he paid a $50.00 fine (107, 108). He was a member of a trade union called "Elevator Construction Local 1" and was employed by Diesel Construction for the past five (5) years (107, 108). Prior to that time he worked for the Turner Construction Company, Tishman Construction and was with the Otis Elevator Company for ten to eleven years (108). In all, he spent twenty-four (24) years in the construction industry (108). His specific job was to operate a lift to take the personnel to the various floors of buildings under construction (109). He made an average of $25,000 yearly as a salary (109). Continuing the history of his employment, McNally related that in 1963 he owned a bar

and catering establishment, (110).** The witness was friendly with Lynch and their families frequently socialized (110, 111). While he was employed, he met Lynch frequently and the lunched together (111). Lynch drove a truck for CBS. He met McNally and they went to Old Bohemia to buy meat. It appeared that McNally picked up meat for the other workers as well as for Lynch (112). McNally did this because it was cheaper to buy at Old Bohemia (112, 113). In that area, while waiting for the meat, Lynch and he frequently went to bars, McNally designating the bars in his testimony (114, 115).

On June 26, 1974 he and Lynch did not hijack the truck (256). He described his activities on June 26, 1974 which was the date of the events alleged in the first count of the indictment (116). Thus, McNally told the jury that on that date he was at a party in Queens at 30th Avenue and 31st Street (117). That was a birthday party for a person named Seviro and he placed 12:30 A.M. as his time of arrival there (117). The party was open to all comers because apparently the guest of honor worked at a bar and it was customary to have a birthday party for the person who worked there thus enabling the various patrons to

** It is respectfully requested that judicial notice be taken that to maintain a bar a license has to be given by the State of New York.

bring gifts. The name of the place was the "Candlelight" (118).

When he was arrested for a traffic violation, he was fingerprinted and photographed (119).

Gerald Collins next was called by the defense. He was a special agent with the FBI. He testified that on November 12, 1974 he attended a line-up in connection with the appellant Lynch (158). Jermott was brought to view the line-up (158). Upon doing so Jermott stated he recognized no one in the line-up (158, 159). On the same date there was a line-up with the appellant McNally participating (159). Jermott was also unable to recognize McNally (159).

POINT I:

THE APPELLANTS' RIGHT TO A FAIR TRIAL AND REPRESENTATION OF COUNSEL WAS PREJUDICED AND AT THE VERY LEAST THE COURT BELOW SHOULD HAVE DIRECTED A FULL EVIDENTIARY HEARING TO DETERMINE WHETHER THERE WAS A CONFICT AS TO THE SINGLE REPRESENTATION BY COUNSEL OF BOTH APPELLANTS.

After the defense was in and the next day, the U.S. Attorney stated in part that:

> "...I just want to make sure the record is clear on one point, and that is that Mr. Siegal, throughout his discussions with his clients, discussions about which I don't want to know, sees that there is no conflict between them." (163).

The appellants' counsel didn't see any conflict, especially in view of McNally's testimony (163, 164). Then the appellants' then attorney stated that:

> "I am not going to pull anything in the summation, that's for sure, about him creating any conflict. I don't see it."

The Court meanwhile inquired of counsel as follows:

> "While I have you here, I wanted to ask you what you want me to charge other than taking the stand and failure to take the stand. Do you want both? One defendant took it; the other did not."

Then the U.S. Attorney interposed the following:

> "Just so you and I don't have to face a 2255 down the road, if, without any embarrassment, Mr. Lynch and Mr. McNally at this point could just briefly say on the record at this point they are satisfied with Mr. Siegal..." (164)

The Court then stated that it would appreciate the appellants' responses (164, 165). The Court added that it would suffer if a "2255" were instituted (165).

In the robing room, the appellants' trial counsel addressed them briefly and recounted to the appellants that from "time to time" the issue of conflict was discussed and it was determined there was no conflict. Each appellant stated that the issue was raised and that there was no conflict and that both consented to the singular representation (165, 166).

It is respectfully submitted that the hearing was inadequate. The right to counsel under the 6th Amendment is a part of the constitutionally mandated adversary method of resolving guilt or innocence in a criminal action. See also Faretta v. California, 95 S.Ct. 2525 at pages 2532, 2533.

It is further submitted that the right to counsel means competent counsel.

Put another way, the right of counsel contemplates the services of counsel devoted solely to the interests of the client. See VonMoltke v. Gillies, 332 U.S. 708 (1948). In Glasser v. United States, 315 U.S. (1942) it was held that the accused loses his right of counsel when counsel attempts to represent him and other co-defendants who have divergent or incompatible defenses.

While the right to counsel of course can be waived, see Faretta v. California, supra, 95 S. Ct. 2525 (1975) at page 2541, it would seem therefore that multi-defendants can waive their right to separate representation and have one lawyer. However, no waiver of such a fundamental constitutional right can be presumed from a silent record. For the waiver of a constitutional right has to be knowledgeable and if it is knowledgeable then the right can be waived. See Boyd v. Dutton 405 U.S. 1 (1972).

Accordingly, to have an articulated record instead of a silent record it would seem that a full evidentiary hearing be had to determine whether multi-defendants actually consent to have singular representation. In U.S. v. De Berry, 487 F. 2d 448 (Cir. 2d, 1973) this Court had before it the issue of singular representation with multi-defendants where the trial strategy was that one defendant would exonerate the other. There the two defendants knew each other for "years". At the second day of trial the U.S. Attorney became alerted to the problem of conflict. However the attorney for both defendants stated that only one defendant would take the stand and the Court asked whether that defendant, who would testify, would incriminate the other defendant and the counsel for that defendant replied negatively. Then this Court citing Morgan v. U.S., 396 F. 2d at page 114 stated that there is a major problem where one of the joint defendants decides to testify and the other does not. The Court in DeBerry, at the time of sentencing, inquired of the defense as to a conflict. In reversing the convictions of both defendants, this Court stated at page 453 that:

> "It is true that here, on the second day of trial, at the time of the colloquoy previously referred to, counsel for both defendants did assure the Court that 'I have explained and gone over all the facts with both of these

defendants in my office numerous times'..."

> "This is quite another thing however from the Court interrogating the individual defendants themselves. It is also true that at the time of sentencing the Court did conduct such an inquiry but by that time the damage, so to speak, had been done. Moreover, it may be assumed that neither party would have wanted to annoy the Court at that stage of the proceeding."

It would seem that the hearing conducted by the Court below did not show any knowledgeable waiver and did nothing more than to evoke a single response from each appellant. In other words, the fact that the defendants consented when being questioned by the lawyer did not establish a knowledgeable waiver of their right to effective counsel. Thus their single attorney recognized the conflict by stating that he "would't pull anything in summation" (164). But McNally exercising his constitutional right, testified. So in summation the attorney stated that while a defendant doesn't have to testify, McNally did and exposed himself (168). Meanwhile Lynch didn't.

Then there is the U.S. Attorney stating that both appellants were "close friends". "Close friends in the hijacking business" (173). The U.S. Attorney all but added that the appellants were so close that they shared one attorney.

It is therefore submitted that the Court should have initially, prior to trial, conducted a full evidentiary hearing to explore the issues of conflict or no conflict, the appellants free choice in selecting one attorney, and the involvements. Thus some of the considerations that should have been brought home to the defendants, and there is nothing in this record to show that these considerations were given to them, were that respective counsel could devise distinct trial strategies to suit the respective roles of the appellants. Thus, an attorney for Lynch could have cross examined McNally. The attorney for McNally could possibly have called Lynch if Lynch could be truthful, to exonerate McNally, at the same time without prejudicing his own case. It is true that these are hypothetical considerations, but on the meager record over here, nobody knows just what was told to these appellants and what motivated them to say that they were satisfied to have one attorney. The issue here isn't to the questioning by the very attorney who occupied the role to joint defendants as their attorney, but what the Court could elicit from each respective appellant so that the Court could be satisfied that the appellants knowingly waived their right to have separate attorneys. As was stated in

Ray v. Rose, 491 F. 2d 285 (Cir.6th, 1974), at page 289:

> "...If an attorney's duty is firstly to protect and represent his clients' interest, uninfluenced and uneffected by conflicting considerations, as the courts have held [leaving aside for the moment the 'farce and mockery of justice'] the necessity for an evidentiary hearing in the present case would appear to be inevitable..."

Pressing this further, if there were two attorneys each attorney could have respectively summed up for each of the appellants, rather than have the restraint expressed by counsel that "I am not going to pull anything in the summation, and that's for sure, about him creating any conflict" (164).

Furthermore, this issue unfortunately arose near the conclusion of the trial. As a matter of fact this is after McNally testified. If there was a full evidentiary hearing where the detriment of a conflict of interest could arise, then the Court would have in the position of having a mistrial which would entail discharging the jury, selecting another jury, and undergoing the trial again.

The fact that Lynch did not testify was his right; the fact that McNally did, which was his right, could stimulate the lay jury to conclude that McNally was guilty under the first count, because Lynch by not testifying did not want to implicate McNally.

It is further put to this Court that under the circumstances here the manner of resolving the "conflict" resulted in a chilling effect on the right to be represented by counsel. We just don't know what goes through the minds of many defendants in criminal cases where after undergoing a trial which is all but concluded, the issue arises that they could have different counsel. This with the resulting mistrial could stimulate an accused to conjecture that he'd have to pay a lawyer again, he's have to go through the anxieties and the rigors of a trial, and if he already had testified, the prosecutor would in effect have had a "discovery" which would enable him to be further effective in a re-trial where the same accused testified again.

The U.S. Attorney's apprehension of a post-conviction application under Section 2255 (28 U.S.C.) was well founded. It is put that the very least that should be done here is to direct an evidentiary hearing to determine the issues raised.

POINT II:

THE APPELLANTS' RIGHT TO CALL WITNESSES WAS IMPROPERLY SUPPRESSED.

The 4th Amendment to the Federal Constitution provides that a defendant in a criminal case has the right to call witnesses and present a defense. See Chambers v. State of Mississippi, 410 U.S. 284 (1973).

McNally hy his testimony claimed alibi. It is suggested that an alibi defense is highly appropriate to a case such as this. It is the most effective defense if the alibi witnesses testify truthfully. Yet after the defense was partly put in, we find this:

> "Mr. Siegal: I intended to save you a lot of time today. I was going to cancel out on a number of witnesses. I was only waiting for one. He was subpoenaed down here at police headquarters, and I hope to get him here any minute..."
>
> "Mr. Siegal. For a couple of minutes, because he's an important witness to me."
>
> "The Court: Sure." (163).

Except for the one federal agent who testified for the defense, there were no other witnesses for the defense. It is suggested that the right to call witnesses couldn't be waived by the appellants' attorney; rather there had to be an

affirmative consent by the defendants. Obviously since counsel had witneses, their prospective testimony would have been helpful. Appellants again avert to the statement by counsel that there was a witness under subpoena but because the prospective witness "didn't honor the subpoena" the defense rested (166).

On summation the prosecutor stated in part that:

> "...Of course there are no witnesses here who were at that party to support Mr. McNally's testimony that he was at a party, and he was at a party with his friends. I suggest to you that if he was really there, or if the party really happened, he would have had his friends here to testify that on June 26, 1974 he could not have been at a hijacking, he was at a party. They are not here, and that is because Mr. McNally was hijacking." (175).

On that page of the appendix, the District Attorney further goes into the failure to have alibi witnesses.

There does not appear to be any consent by the appellants not to call witnesses or if such witnesses were under subpoena to waive their appearance. Since this is a fundamental right, it would seem that there had to be an affirmative showing that the appellants knowingly surrendered this right. If this was trial strategy, it is submitted there still has to be an affirmative showing that the appellants concurred in the trial strategy after consultation with counsel. Instead, there is a silent record. Where a waiver of a fundamental right is involved, the facts are more strictly construed against the prosecution then where a mere 4th Amendment right is involved. As shown

hereinabove, the possible defense and the calling of witnesses went to the integrity of the fact finding process. See Scheckloth v. Bustamonte, 412 U.S. 218 (1973).

While trial strategy may not fulfill the expectations underlying the adoption of such strategy, nevertheless where a fundamental right is involved, it would seem that the accused be made aware of this strategy and concur in it. This Court stated in U.S. v. Calabro, 467 F. 2d 973 (Cir. 2d, 1972) on pages 985-986 that:

> "The American Bar Association Project on Standards for Criminal Justice concludes that a defendant is entitled to make the ultimate decision only in regard to whether to plead guilty, whether to waive a jury and whether to testify: 'all other strategic and tactical decisions are the exclusive province of the lawyer after consultation with his client'..."

There was no showing that the defendants were consulted in regard to the failure to arrange for the appearance of the witnesses referred to hereinabove.

POINT III:

THE COURT'S CHARGE AS TO IDENTIFICATION WAS INADEQUATE.

On pages 192-198, the Court charged the jury as to the standards to be adhered to, to establish identification. It is put, that the standard charge delineated in U.S. v. Holley, 502 F. 2d 273, (Cir. 4th, 1974) should have been utilized. That opinion has annexed to it the "Model Special Instructions on Identification". Thus while the Court below told the jury that the prosecution has the burden of proof, it did not state to the jury that the prosecutor's burden "specically includes the burden of proving beyond a reasonable doubt the identity of the defendant as the perpetrator of the crime which which he stands charged..."

CONCLUSION:

THE JUDGMENTS OF CONVICTION SHOULD BE REVERSED.

Respectfully submitted,

ARNOLD E. WALLACH

STATE OF NEW YORK)
: SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 21 day of Aug, 1975 deponent served the within Brief upon U.S. Attorney

attonrye(s) for appellee

in this action, at U.S. Courthouse
Foley Sq
N.Y.C.

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.

.....
ROBERT BAILEY

Sworn to before me, this
21 day of Aug, 1975.
William Bailey
WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1976